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SUPREME COURT OF THE

UNITED STATES

October Term 1967

No. 1293

FRED CHERRY, et al.,

Petitioners,

–against–

THE POSTMASTER-GENERAL OF THE UNITED STATES, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Petitioners,

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THE POSTMASTER-GENERAL OF THE UNITED STATES, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Fred Cherry, Petitioner, *pro se,* and Julius C. Tortorice, Petitioner, *pro se,* respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above-entitled case on February 6, 1968.

OPINIONS BELOW

The opinion of the United States District Court for the District of Puerto Rico is reported at 272 F. Supp. 982. It is reproduced in Appendix C of this petition, pages 53a-60a *infra.*

The Court of Appeals for the First Circuit did not render an opinion. Its judgment is reproduced in Appendix D of this petition, page 66a *Infra.*

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was filed and entered on February 6, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The Post-Office Department seized numerous post cards mailed to numerous persons and organizations by one of the petitioners (the sender). After a considerable period of time had elapsed from the time the seizures began, the Post-Office Department held an administrative proceeding at which the sender's post cards were found to be non-mailable and ordered to be destroyed. The sender thereupon brought suit to enjoin destruction of the post cards and one to whom post cards were mailed intervened (the receiver). The sender and receiver also demanded the calling of a three-judge court to pass on the constitutionality of the statutes which provide for the seizure, detention, and destruction of said post cards. The District Court dismissed the complaint for failure to raise a substantial federal question and the Court of Appeals affirmed.

The questions presented are:

1. Are the statements on the sender's post cards, in general, protected from suppression by the First Amendment to the United States Constitution?

2. Does 18 U.S.C. 1718, on its face or as applied, violate either the sender's or the receiver's rights to freedom of speech and press as guaranteed by the First Amendment to the United States Constitution?

3. Assuming that newspapers or magazines may be sent through the mails without wrappers, with defamation and scur-

rility exposed on their exterior surface; does 18 U.S.C. 1718, on its face or as applied, violate either the sender's or the receiver's rights under the due process clause of the Fifth Amendment to the United States Constitution?

4. Does 39 U.S.C. 4001, on its face or as applied, violate either the sender's or the receiver's rights to freedom of speech and press as guaranteed by the First Amendment to the United States Constitution?

5. Does 39 U.S.C. 4001, on its face or as applied, violate the sender's rights under the due process clause of the Fifth Amendment to the United States Constitution?

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The statutes, etc., whose construction are herein involved are:

The First Amendment to the United States Constitution.
The Fifth Amendment to the United States Constitution.
18 U.S.C. 1718.
39 U.S.C. 4001.
39 C.F.R. 124.4(a), 39 C.F.R. 124.5(e), 39 C.F.R. 124.9(b), 39 C.F.R. 952.19 and 39 C.F.R. 953.

These statutes, etc., are set forth in Appendix "A", *infra*.

STATEMENT OF THE CASE

A

The petitioners are; Fred Cherry, *pro se*, and Julius C. Tortorice, *pro se*. The respondents are; the Postmaster-General of the United States; and the Postmasters of Brooklyn, New York; New York, New York; and San Juan, Puerto Rico. Numerous post cards mailed by Fred Cherry (the sender) were seized by the Post-Office Department and after a considerable period of time had elapsed, (see Affidavit, Appendix C, pages 37a-38a, *infra*) the Post-Office Department held an administrative proceeding at which the post cards which had been seized previously were found to be non-mailable, and ordered to be destroyed. (see Appendix B, pages 11a-21a, *infra*, and Appendix C, pages 30a-36a, *infra*) The sender thereupon brought suit to enjoin the

destruction of the post cards and Julius C. Tortorice, Petitioner, to whom one of the post cards was mailed intervened (the receiver). (see Motion to Intervene, Appendix C, page 52a, *infra*) A sample of one of the post cards is exactly reproduced as an exhibit to the complaint. It is herein reproduced in Appendix C, pages 35a-36a, *infra*. The petitioners also demanded the calling of a three-judge court to enjoin the enforcement of 18 U.S.C. 1718 and 39 U.S.C. 4001 for repugnance to the United States Constitution. (Paragraphs 1, 3, and 4 of section of complaint praying for relief, Appendix C, pages 28a-29a, *infra*). The petitioners also demanded that the three-judge court render a declaratory judgment that 18 U.S.C. 1718 and 39 U.S.C. 4001 are unconstitutional. (paragraphs 5 and 6 of the section of the complaint praying for relief, Appendix C, page 29a, *infra*). The District Court eventually dismissed the complaint for failure to raise a substantial federal question. (Memorandum of Decision, Appendix C, pages 53a-60a, *infra*) and the Circuit Court of Appeals affirmed without opinion. (Judgment of the Circuit Court, Appendix D, page 66a, *infra*).

B

Federal jurisdiction in the District Court was alleged in the complaint, *inter alia*, upon 28 U.S.C. 1339, which provides that: "The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to the postal service." (see paragraph 1 of complaint, Appendix C, pages 26a-27a, *infra*) Jurisdiction was further alleged in paragraph 1 of the complaint, *inter alia*, upon 28 U.S.C. 1356 and 5 U.S.C. 1009.

C

The questions herein presented for review were raised and passed upon in the District Court and the Court of Appeals as follows:

1. Question No. 1 was raised in the complaint by alleging therein that: "The information contained in these post cards is true; is of general political, religious, and sociological significance; and is fair comment upon the conduct of persons in respect of public affairs." (paragraph 6 of complaint, Appendix C, page

27a, *infra*). Also the sender specifically argued that his writings were protected from suppression by the First Amendment in that portion of his brief, filed in the District Court on 1/17/67, which was reproduced on page 18 of the Appendix to petitioners' Appellate brief. This portion is also reproduced herein at Appendix C, pages 39a-40a, *infra*. The District Court passed upon this point in two ways. First, the District Court held that the sender admits in his brief that the post cards are, among other things, libelous and threatening. (Opinion, Appendix C, pages 56a-57a, *infra*). (The petitioners will argue, *infra*, that the sender made no such admission.) The District Court also held that it does not seem that the speech sought to be protected is of general political, religious, and sociological significance, nor does it seem to be a fair comment upon the conduct of persons in respect of public affairs. (Opinion, Appendix C, page 58a, *infra*). The same point was then raised before the Court of Appeals, in paragraph 2 of the statement of points. (Appendix D, page 64a, *infra*). As mentioned previously, the Court of Appeals did not render an opinion.

Question No. 2 was raised in paragraph 9(a) of the complaint. (Appendix C, page 28a, *infra*) The District Court specifically ruled upon this point by holding that: "Plaintiff is not foreclosed from expressing himself. Simply, the manner in which it is done is regulated by law in a very minor form. This does not amount to an abridgement of the First Amendment rights." (Appendix C, page 58a, *infra*). This same point was then raised before the Court of Appeals in paragraphs 3a and 3b of the statement of points. (Appendix D, page 64a, *infra*). As mentioned previously, the Court of Appeals did not render an opinion.

Question No. 3 was raised in paragraph 9(b) of the complaint. (Appendix C, page 28a, *infra*). This point was not even mentioned in the District Court's Opinion. The same point was then raised in paragraphs 4a and 4b of the statement of points before the Court of Appeals. (Appendix D, page 65a *infra*). As mentioned previously, the Court of Appeals did not render an opinion.

Question No. 4 was raised in the *amended* complaint, filed

on 12/23/66. (Appendix C, pages 38a-39a, *infra*). The District Court specifically ruled upon this point, in its Opinion, by holding that: "The Post Office Department held an administrative hearing and it was after this hearing that the ruling came as to the destruction of plaintiff's post cards. There has been no showing by the plaintiff as to why this Court should hold that his [*sic*] procedure is contrary to the due process of law or any other constitutional or legal right. Plaintiff's rights are fully protected and provided for in this procedure and there is no denial of due process merely because the courts of law do not intervene in the matter in the first instance. *Public Clearing House* v. *Coyne*, 1904, 194 U.S. 497." (Appendix C, pages 58a-59a, *infra*). (The petitioners will argue, *infra*, that this neglects the allegation that the post cards were seized and detained a considerable period of time *before* the administrative hearing was commenced.) The above-quoted excerpt from the District Court's Opinion also passes upon question No. 5. Question No. 5 was raised in paragraph 10 of the complaint (Appendix C, page 28a, *infra*). Question No. 4 was raised before the Court of Appeals at paragraphs 5a and 5b of the statement of points. Question No. 5 was raised before the Court of Appeals at paragraphs 6a and 6b of the statement of points. (Appendix D, page 65a, *infra*). As mentioned previously, the Court of Appeals did not render an opinion.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The main question in this case is whether the Federal Government may censor truthful criticism of public figures when said criticism appears on the exterior surface of mail, merely because said criticism reflects injuriously on the character or conduct of the person criticized. This question has never been before this Court, although it has been decided numerous times by lower courts. Most of the lower court decisions have upheld the Federal Government's power to so censor. Collections (by

no means complete) of these cases may be found at 11 A.L.R. 3rd 1276 and 112 A.L.R. 1145. The annotator, at 11 A.L.R. 3rd 1278, holds that: "Contentions that the statutes in question should be found invalid as infringing freedom of speech as guaranteed under the First Amendment . . . have not found favor with the courts." This widely-held notion that the use of the mails is *not* protected by the First Amendment ought to be corrected by this Court.

QUESTION No. 1

THE STATEMENTS ON THE SENDER'S CARDS ARE, IN GENERAL, PROTECTED FROM SUPPRESSION BY THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

The Court of Appeals, in affirming the judgment of the District Court, has sanctioned a judgment which was arrived at in a manner which so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. As part of its opinion, the District Court held that: "Plaintiff does not . . . deny that said post cards are in fact libelous, defamatory, sucrilous and threatening. It would seem from his brief that, on the contrary, he candidly admits that this is the nature of his postcards." (See Appendix B, pages 56a-57a, *infra*). This finding was vigorously denied before the Court of Appeals on pages 13-15 of Petitioners' brief before that Court as follows: (Please note that R.A. 17-19, for example, refers to pages 17-19 of the record appendix to Petitioners' *Appellate* brief.)

> The District Court further erred in holding that plaintiff-appellant did not "deny that said postcards are in fact libelous, defamatory, scurrilous and threatening. It would seem from his brief that, on the contrary, he candidly admits that this is the nature of his postcards." (R.A. 32-33). As previously mentioned, plaintiff-appellant alleges, in his complaint, that the statements on the post cards are true, are of general political, religious and sociological significance and are fair comment on persons in respect of

public affairs. (R.A. 5). If this be so, then the statements cannot, as a matter of law, be libelous. Furthermore, the plaintiff-appellant *did* argue that the statements on the post cards are not libelous. Plaintiff-appellant distinguished the case of *McCrossen* v. *United States*, 339 F.2d 810, from the present case by noting that McCrossen's statements were libelous and threatening while plaintiff-appellant's statements are not (R.A. 17-19). Furthermore, in holding that the plaintiff-appellant candidly admits, in his brief, that the post cards are libelous, the District Court has made a finding without a scrap of evidence to support it. For this reason the appellants have made available to this Court, as part of the record, all briefs submitted by both sides. If the appellees care to point out the place where either appellant made said admissions, or, indeed where appellees even charged that the post cards were libelous, they are at liberty to do so. The appellees have correctly stated that the plaintiff-appellant sent the post cards in question and intended that the statements thereon would reflect injuriously upon the character or conduct of another person (R.A. 10-11). The appellants have *never* admitted anything even remotely resembling the admissions which the District Court charges them with having made. Similarly, the District Court erred in holding that the post cards are threatening. Why should plaintiff-appellant have taken the trouble to formally deny that the post cards are threatening when there had not been the slightest suggestion made to that effect prior to the decision of the District Court? Furthermore, as mentioned previously, in arguing that the post cards in question differed from the writings in the case of *McCrossen* v. *United States,* 339 F.2d 810, plaintiff *did*, in effect, deny that the post cards in the present case are threatening. (R.A. 17-19). But rather than consider the question of accusations or denials in reference to the alleged threatening character of the post cards, it is far more important to consider the actual question of whether or not the post cards *are* threatening. This is easily decided since it is obvious, *on their face,*

that the post cards in question are not threatening. Finally, the District Court held that: "As the United States Attorney pointedly suggests, the matter printed on plaintiff's post cards is, in fact otherwise mailable by law. It could have been printed on a piece of paper, enclosed in an envelope and sent through the mails. It still can" (R.A. 34). If this be true, the post cards cannot, as a *matter of law*, be threatening. If they were, then they would violate 18 U.S.C. 875-876.

The portion of the brief before the District Court, referred to above, is reproduced herein in Appendix C, pages 39a-41a, *infra*. In addition, all of the briefs before the lower courts have been made a part of the record before *this* Court and therefore the Respondents can *still* answer this argument by pointing out, *if they can*, (1) Where, in any brief or other paper, the Petitioners admit that the post cards are libelous or threatening; (2) Where, in any brief or other paper before the District Court, the Respondents have even *accused* the post cards in question of being either libelous or threatening. The Respondents, in their Appellate brief, were unable to answer these questions. All they could say was: "18 U.S.C. 875 and 876, cited by appellants (Brief, p. 15), merely punish the use of interstate commerce or the mails for the purposes of extortion." (See footnote at page 15 of Respondents' Appellate brief.) The fact is that the District Court has done more than merely make a finding without a scrap of evidence to support it. Actually, what the District Court has done, and the Court of Appeals has sanctioned, was, *sua sponte*, to manufacture evidence out of thin air in order to support its decision.

The Court of Appeals has also sanctioned other departures from the accepted and usual course of judicial proceedings. It is a standard principle that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley* v. *Gibson*, 355 U.S. 41, 45-46. In the case at bar however, the District Court, in dismissing the complaint, has assumed a set of facts which are the

exact opposite of some of the facts set forth in the complaint. Thus, paragraph 6 of the complaint alleges that: "The information contained in these post cards is true; is of general political, religious, and sociological significance; and is fair comment upon the conduct of persons in respect of public affairs." (Appendix C, page 27a, *infra*). However, the Opinion of the District Court holds that: "To use plaintiff's own words, it does not seem that the speech sought to be protected in these circumstances 'is of general political, religious or sociological significance'; nor does it appear, in these same circumstances, to be 'a fair comment upon the conduct of persons in respect of public affairs' ". (Appendix C, page 58a, *infra*). And, as previously mentioned, the District Court manufactured evidence in order to describe the post cards as being libelous. If the information on the post cards "is true; is of general political, religious, and sociological significance; and is fair comment upon the conduct of persons in respect of public affairs"; then it cannot, *as a matter of law*, be libelous. So that the District Court, once more, assumed a fact as being the *exact opposite* of a fact alleged in the complaint.

In addition, the "Request for Admission of Facts" contained in Appendix C, pages 41a-48a, *infra*, indicates that the information inscribed on the post cards is true; is of general political, religious, and sociological significance; and is fair comment upon the conduct of persons in respect of public affairs. The request was never answered by the respondents because the respondents moved, and the Court held, that the respondents need not answer this request during the pendency of the respondents' motion to dismiss the entire action. (See Appendix C, page 49a, *infra*, and Docket Entry of 3/3/67, Appendix C, page 24a, *infra*.)

With the underbrush cleared away, so to speak, we can now consider one of the main questions of the case. If speech is true; and is of general political, religious, and sociological significance; and is fair comment on persons in respect of public affairs, it should, in general, be protected from suppression by the First Amendment. The fact that the speech sought to be protected includes strong criticism should not make any differ-

ence. As this Court held in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270: "Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on governmental and public figures. See *Terminiello* v. *Chicago*, 337 U.S. 1, 4." Also see *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130. In the *Butts* case, this Court held that even *erroneous* criticism could not be suppressed. It would certainly be the height of tyranny to permit erroneous criticism in one case and suppress truthful criticism in another. One of the principles involved here, namely: "*EQUAL* JUSTICE UNDER LAW" (emphasis supplied) is so important that it is carved into the facade of the Supreme Court Building itself.

QUESTION No. 2

18 U.S.C. 1718, ON ITS FACE AND AS APPLIED, VIOLATES BOTH THE SENDER'S AND THE RECEIVER'S RIGHTS TO FREEDOM OF SPEECH AND PRESS AS GUARANTEED BY THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

The next point is whether speech which, in general, is protected from suppression by the First Amendment may be censored when it appears on post cards or envelopes. In *Speiser* v. *Randall*, 357 U.S. 513, 518, this Court held that: "It has been said that Congress may not, by withdrawal of mailing privileges, place limitations upon the freedom of speech which if directly attempted would be unconstitutional." In *Lamont* v. *Postmaster-General*, 381 U.S. 301, 305, this Court held that: "The United States may give up the Post Office when it sees fit, but while it carries it on the right to use the mails is almost as much a part of free speech as the right to use our tongues . . ." The same principle which applies to mail in general should also apply to post cards in particular. It is a well-known fact that commercial

advertisers use post cards. (the so-called "junk mail"). Therefore people who wish to disseminate political information and opinion should also be allowed to use post cards. The principle is; if commercial advertisers are permitted to use a certain medium, then governmental action ought not to abridge the right of a political advertiser to use that same medium. See, for example, *Kissinger* v. *New York City Transit Authority*, 274 F. Supp. 438. Also see *Wirta* v. *Alameda – Contra Costa Transit District*, California Supreme Court, 12/21/67, 434 P.2d 982. This argument can also be considered as another facet of the principle of "EQUAL JUSTICE UNDER LAW".

The Opinion of the District Court, as sanctioned by the Court of Appeals and which appears at 272 F. Supp. 982, conflicts with the entire spirit and philosophy of the First Amendment. It is true that freedom of speech is not absolute, but suppression of speech is the exception, and not the rule. Speech can be suppressed only for compelling reasons, such as riot prevention, etc. The only reason for the suppression in the case at bar, in the Opinion of the District Court, is that the sender has "bent into license" the freedoms of speech and press. (Appendix C, page 57a, *infra*). Obviously this is a meaningless phrase. It can be said of any unpopular opinion that its proponents have "bent into license" the freedoms of speech and press. Actually, the respondents, in their Appellate brief, admit that the purpose of the laws and regulations in question, as applied to the present case, is to protect the reputation of named individuals. (See pages 6, 10, and 14 of respondents' Appellate brief.) In other words, the respondents have claimed that the truth involving matters of general public concern should be suppressed solely in order to protect the reputation of a public figure. It should be noted that the person whose reputation the Post Office Department is so anxious to protect–the Reverend Robert W. Wood–is himself publicly attacking the reputation of Jesus Christ. This notion that the truth involving matters of general public concern should be suppressed solely in order to protect the reputation of public figures, is absolutely foreign to the American way of life, and if permitted to stand will eventually lead to the destruction of all our cherished freedoms.

QUESTION No. 3

ASSUMING THAT NEWSPAPERS OR MAGAZINES MAY BE SENT THROUGH THE MAILS, WITHOUT WRAPPERS, WITH DEFAMATION AND SCURRILITY EXPOSED ON THEIR EXTERIOR SURFACES; 18 U.S.C. 1718, ON ITS FACE AND AS APPLIED, VIOLATES BOTH THE SENDER'S AND THE RECEIVER'S RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The first part of this question is; *are* newspapers and magazines sent through the mail, without wrappers, with scurrility and defamation exposed on their exterior surfaces? The petitioners claim that such is the state of facts. (See paragraph 9(b) of complaint, Appendix C, page 28a, *infra*.) The District Court, in its Opinion, has not even mentioned this claim of discrimination raised in the complaint. Since the Court of Appeals has not rendered an opinion, the Court of Appeals has sanctioned this action of the District Court. As mentioned previously, a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley* v. *Gibson*, 355 U.S. 41, 45-46. As a matter of fact, the Initial Decision of the Hearing Examiner *admits* that the above-mentioned discrimination exists. In Appendix B, page 12a-13a, *infra*, the Initial Decision contains the following: "The Respondent filed an answer stating substantially as follows: '. . . (c) The withholding of such cards by the Post Office Department is unlawful and discriminatory since the Department permits and accepts for delivery newspapers and magazines containing defamation and scurrility on their front and rear pages clearly visible to Post Office employees." In commenting on this item, the Initial Decision, in Appendix B, page 16a-17a, *infra*, states: "The case of *U.S.* v. *Higgins*, 194 Fed. Rep. 539 (D.C.W.D.Ky. 1920) [*sic*, should be 1912], cited by Respondent is not germane to the issue here for the reason that the court held that the statute applied only to envelope wrappers and outside

covers of mailed newspapers and not to the papers themselves. Postal cards and post cards were not involved. This case was subsequently criticized by another court." In the *Higgins* case, *supra*, a newspaper was sent through the mail *without a wrapper*. The court found that the material exposed on the outside surface of the newspaper was scurrilous and defamatory and that: "it was calculated by its manner and style of display, and indeed was obviously intended to reflect upon the character and conduct of [another]." Nevertheless, the newspaper involved was found not to have violated the law.

Assuming that newspapers and magazines similar to the newspaper in the *Higgins* case, *supra*, are presently permitted to be sent through the mail, it would constitute a violation of the Fifth Amendment to suppress the distribution by mail of the sender's post cards. As this Court has held in *Lovell* v. *Griffin*, 303 U.S. 444, 452: "The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." As far as discrimination in general is concerned, this Court has held, in *Schneider* v. *Rusk*, 377 U.S. 163, 168: "while the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.' *Bolling* v. *Sharpe*, 347 U.S. 497, 499." In the Schneider case, *supra*, this Court found that 8 U.S.C. 1484 created "indeed a second-class citizenship." (377 U.S. at 169). Similarly, 18 U.S.C. 1718 creates a second-class freedom of the press, and is so unjustifiable that neither the District Court nor the Court of Appeals even *tried* to justify this discrimination. As a matter of fact, even the Respondents, in their Appellate brief, admit, in effect, that this discrimination is unjustifiable. The Respondents attempt to get around this point by arguing, on page 17 of their Appellate brief, that: "We note, first, that as the Post Office Department interprets 18 U.S.C. 1718, newspapers which contain exposed defamatory matter, like defamatory postal cards *are* nonmailable. There is thus absolutely no basis for appellants' statement (Appellants' Brief, p. 24). that: 'It is a common everyday practice for news-

papers to be sent through the mails, without wrappers, with scurrility and defamation exposed on their exterior surfaces.' [footnote] *(United States* v. *Higgins*, 194 Fed. 539 (D.C.W.D. Ky.), held that the exposed portion of an unwrapped newspaper, although containing defamatory matter, does not fall within 18 U.S.C. 1718 because the newspaper itself does not constitute 'the envelope or outside cover or wrapper'. The *Higgins* decision is contrary to *United States* v. *Burnell*, 75 Fed. 824 (D.C.S.D. Iowa), was criticized in *United States* v. *Anderson*, 268 Fed. 696 (D.C.D. Mont.), and is not followed by the Post Office Department.)"

The respondents may argue, as they have argued previously, that the Post Office Department has the power to censor the truth involving matters of general public concern appearing on the outside surface of newspapers and magazines, but they have *not* argued, nor can they argue, that they have actually *exercised* this power in modern times. If their claim were really valid, then the least they ought to do now is to cite a few cases in which magazines or newspapers were denied mailing privileges for the "crime" of revealing the truth involving matters of general concern, merely because said truth reflected injuriously upon the character or conduct of public figures. The petitioners have insisted, and continue to insist, that they can *prove* that magazines and newspapers are presently being sent through the mails, without wrappers, with scurrility and defamation exposed on their exterior surfaces. The fact is that in the case of *Lamont* v. *Postmaster-General*, 381 U.S. 301, the Communist Party of China won the right to send magazines containing defamatory attacks on public figures by unsealed mail. It should be noted that the Communist Party of China previously enjoyed the right to send magazines containing defamatory attacks on public figures by sealed mail. When it is also considered that the decision of *United States* v. *Higgins, supra*, 194 Fed. 539, permits these same magazines to be sent through the mails without a wrapper, we see that the Communist Party of China enjoys a greater degree of freedom of the press in our *own* nation than an American citizen. Surely, the principle of "EQUAL JUSTICE UNDER LAW" demands that an American citizen enjoy at

least the same amount of freedom of the press in his own country as is presently enjoyed by the Communist Party of China.

There is one more aspect of this claim of discrimination. As the respondents themselves point out, in a footnote at page 17 of their Appellate brief: "39 C.F.R. 124.9(b) provides that when the local postmaster is in doubt as to the mailability of matter under specified laws, including 18 U.S.C. 1718, he shall 'withhold it from dispatch or delivery, and shall send a sample or a complete statement of the facts to the Mailability Division, Office of the General Counsel, for instructions. Newspaper containing doubtful matter should be promptly reported to the Mailability Division, Office of the General Counsel, but they should not be withheld from dispatch without specific instructions.'" (See Appendix A, pages 3a-4a, *infra.*)

Now, let us consider a hypothetical example. A newspaper is sent through the mail. The local Postmaster observes defamatory material on its exterior surface. He writes to Washington, D.C. for instructions. While awaiting instructions, the newspaper gets delivered, and by the time instructions are received, it is too late to do anything except to arrest the publisher as a criminal, and give him a trial by jury. Thus the publisher of a newspaper is not subjected to prior restraint, while the sender of a post card is subjected to prior restraint. Thus not only are the petitioners subjected to prior restraint, but discriminatory prior restraint at that. This brings the argument to its next point.

QUESTION No. 4

39 U.S.C. 4001, ON ITS FACE AND AS APPLIED, VIOLATES BOTH THE SENDER'S AND THE RECEIVER'S RIGHTS TO FREEDOM OF SPEECH AND PRESS AS GUARANTEED BY THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

This question refers to prior restraint and administrative censorship. This Court, in *Bantam Books Inc.* v. *Sullivan*, 372 U.S. 58, 70, held that: "Any system of prior restraint of expression comes to this Court bearing a heavy presumption against

its constitutional validity." In a concurring opinion in *Manual Enterprises* v. *Day*, 370 U.S. 478, 497-499 (particularly footnote No. 4 at page 498), Justice Brennan clearly and specifically held that a claim that administrative censorship by the Post Office Department violates the constitution, is a claim for a three-judge court. In *Freedman* v. *Maryland*, 380 U.S. 51, 61-62, Justice Douglas and Black, in a footnote to a concurring opinion, held that: "The Court today holds that a system of movie censorship must contain at least three procedural safeguards if it is not to run afoul of the First Amendment. (1) the censor must have the burden of instituting judicial proceedings; (2) any restraint prior to judicial review can be imposed only briefly in order to preserve the status quo; and (3) a prompt judicial determination of obscenity must be assured." Also see *Teitel Film Corp.* v. *Cusak*, 19 L ed 2d 966, 968-969.

If this Court declines to pass upon the first three questions presented herein, it would, in effect, permit the continuation of discriminatory political censorship. However, there remains *this* question and the following question which should still be passed upon. In *Manual Enterprises* v. *Day*, 370 U.S. 478, 497, Justice Brennan, in a concurring opinion, held that: "We risk erosion of First Amendment liberties unless we train our vigilance upon the methods whereby obscenity is condemned no less than upon the standards whereby it is judged." It may also be said that we risk erosion of First Amendment liberties (whatever is left of them) unless we train our vigilance upon the methods whereby *political criticism* is condemned no less than upon the standards whereby it is judged. 18 U.S.C. 1718 permits a very mild form of political criticism to be exposed on envelopes and post cards. Cf. *McKnight* v. *United States*, 78 F.2d 931. But when political criticism exposed upon post cards and envelopes becomes slightly more robust, uninhibited, or wide-open, it may then be suppressed at an administrative proceeding. Cf. *Stevens* v. *Summerfield*, 151 F. Supp. 343; Aff'd. 257 F.2d 205. The line between mild political criticism and robust political criticism should be determined, in the first instance, by a court of law, and not by an administrative proceeding. For one thing, an administrative proceeding before the Post Office

Department does not even provide for subpoenas. (39 C.F.R. 952.19, Appendix A, page 4a, *infra*). For another thing, there is no time limit on how long post cards or letters may be detained *before* an administrative hearing is commenced. (See paragraph 4c of Affidavit, Appendix C, page 38a, *infra*.)

Consider the specific example of the post card filed with the District Court at a hearing on 12/23/66 and reproduced in Appendix C, page 50a, *infra*. This post card has not yet been found to be nonmailable. (Any statement by the *receiver* as to its mailability is not binding on the *sender*, since there is no attorney-client relationship between the sender and the receiver.) This card denounces a certain congressman. If the sender tries to mail copies of this card during a congressional election campaign, the Post-Office Department can seize the cards and delay its administrative proceeding until *after* the election. Worse yet, the Post-Office Department may seize, detain, and destroy the cards without any notice or hearing whatsoever. This can be done as provided by 39 C.F.R. 953.2, which provides that: "The rules [rules of practice in proceedings relative to mailability] shall be applicable only to cases where the matter offered for mailing shall be of substantial value or quantity. The initial determination of this question by the General Counsel may be appealed to the Judicial Officer." (See Appendix A, page 5a, *infra*).

On the other hand, even if this Court finds 18 U.S.C. 1718 to be unconstitutional, the Post-Office Department would still retain the power to censor the very same post cards by merely *accusing* them of being obscene. Cf. 39 C.F.R. 124.4(a), 124.9(b), and 953.3, Appendix A, *infra*. Therefore, regardless of whether or not 18 U.S.C. 1718 is found to be unconstitutional, 39 U.S.C. 4001 must be declared to be unconstitutional.

QUESTION No. 5

39 U.S.C. 4001, ON ITS FACE AND AS APPLIED, VIOLATES THE SENDER'S RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The final question to be considered is: What *disposition* is

to be made of items declared to be nonmailable at an administrative proceeding? May the Post-Office Department, *without a judicial determination*, order their forfeiture and destruction, or must they be returned to the sender? It must be noted that the Postmaster-General has the option of either returning the cards to the sender, or ordering their forfeiture and destruction. Volume 1 of Davis, *Administrative Law Treatise*, page 252, points out that, in exercising this discretionary power: "It is undeniable that [political] pressures substantially affect the ultimate conclusion." And, as for the general question of forfeitures without judicial determination, 37 *Corpus Juris Secundum* 11, states: "Regardless whether it is a common-law or judicial forfeiture or a legislative or statutory forfeiture, a judicial determination of the forfeiture by a court of competent jurisdiction is necessary to its validity."

There is another aspect of this question to be considered. The Post-Office Department has consistently refused to inform the sender of the post cards as to the *number* of his post cards seized and as to *when* the seizures took place. (See Paragraphs 4b and 4c of Affidavit, Appendix C, pages 37a-38a, *infra*.) The sender has the right to know this information. If the Post-Office Department is permitted to destroy the post cards in question, then they will have succeeded in permanently depriving the sender of this information. This Court has held that there exists a general right to information. In *Zemel* v. *Rusk*, 381 U.S. 1, 16, (footnote No. 17), this Court held that: "Indeed, it was precisely this sort of consideration which led us to hold in *Kent* v. *Dulles, supra*, 357 U.S. at 126-127, that the right to travel is protected by the Fifth Amendment. See also *Aptheker* v. *Secretary of State, supra*, 378 U.S. at 520 (Douglas, J., concurring)."

If there exists a general right to information, then surely a person is entitled to know *what the government is doing to him.* If a person cannot even determine the particulars of a governmental action directly affecting him, then the situation is similar to the situation described in Franz Kafka's novel: *The Trial.*

CONCLUSION

There are some opinions which, for various reasons, are banned completely from the usual means of entry into the marketplace of ideas. For example, the sender claims to have experienced great difficulties in attempting to disseminate his information and opinion. (See Appendix C, page 51a, *infra.*) As Thomas I. Emerson stated in his article, *Toward a General Theory of the First Amendment*, in 72 Yale Law Journal 877, 953:

> Development of the mass media of communication in this country raises the most pressing current questions as to the scope of government measures necessary or advisable for maintaining an effective system of free expression. The problem has been clear for some time. More and more control over communication is being centralized in the hands of a small group which owns and operates the mass media. As a result the communication reaching most members of the community conforms to a single pattern; other views are rarely or never heard. Instead of a system of open communication, in which all the facts and a diversity of opinion are available in the market place of ideas, our system approaches a closed one in which only a single point of view with minor variations can find an outlet.

Similarly, Jerome A. Barron, in his article, *Access to the Press—A New First Amendment Right*, 80 Harvard Law Review 1641, 1648, states: "A realistic view of the first amendment requires recognition that a right of expression is somewhat thin if it can be exercised only at the sufferance of the managers of mass communications." This, of course, is the reason that the sender uses post cards to disseminate his views. The managers of mass communications are reluctant to disseminate the material on the post cards in question, or equally outspoken material, either by paid advertisement or otherwise, for fear of "rocking the boat." This leaves the use of post cards, in this and similar circumstances, as the only *effective* means of long-distance mass communication. The sender considers that post cards differ from letters in as great a degree as radio broadcasting differs

from telephonic communication. Radio broadcasting is obviously more suited to mass communication than is the telephone. As Eberhard P. Deutsch wrote, in a slightly different context, in, *Freedom of the Press and of the Mails*, 36 Michigan Law Review 703, 732, (1938): "... the suggestion made ... that other avenues of circulation remain open to publishers, attains all the pitiful significance of the statement attributed to Marie Antoinette, who, when told that the people had no bread to eat, suggested 'Let them eat cake!' " Finally, on page 749 of this same article, Deutsch states that: "On the assumption, therefore, that liberty of publishing includes liberty of circulating, and that this liberty is infringed by an abridgement of the right to use the mails, the principle of *Near* v. *Minnesota* [283 U.S. 697] must be held to be at least equally applicable to the act of Congress allowing mail to be banned which carries defamatory matter in its envelope or wrapper." This article was cited with approval by this Court at least twice—once in *Hannegan* v. *Esquire*, 327 U.S. 146, 156, and again in *Manual Enterprises* v. *Day*, 370 U.S. 478, 500.

Respectfully submitted,

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CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part as follows:

"Congress shall make no law . . . abridging the freedom of speech or of the press . . ."

The Fifth Amendment to the United States Constitution provides in pertinent part as follows:

"No person shall . . . be deprived of . . . liberty, or property, without due process of law."

Title 18 U.S.C. No. 1718

All matter otherwise mailable by law, upon the envelope or outside cover or wrapper of which, or any postal card upon which is written or printed or otherwise impressed or apparent any delineation, epithet, term, or language of libelous, scurrilous, defamatory, or threatening character, or calculated by the terms or manner or style of display and obviously intended to reflect injuriously upon the character or conduct of another, is nonmailable matter, and shall not be conveyed in the mails nor delivered from any post office nor by any letter carrier, and shall be withdrawn from the mails under such regulations as the Postmaster General shall prescribe.

Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable matter, or knowingly takes the same from the mails for the purpose of circulating or disposing of or aiding in the circulation or disposition of the same, shall be fined not more than $1,000 or imprisoned not more than one year, or both. June 25, 1948, c. 645, 62 Sta . 782.

Title 39 U.S.C. No. 4001

(a) Matter, the deposit of which in the mails is punishable under sections 1302, 1341, 1342, 1461, 1463, 1714, 1715, 1716, 1717, or 1718 of title 18, is nonmailable.

(b) Except as provided in section 4002 of this title, nonmailable matter which reaches the office of delivery, or which may be seized or detained for violation of law, shall be disposed of as the Postmaster General directs. Pub. L. 86-682, Sept. 2, 1960, 74 Stat. 654.

Sections 124.4 (a), 124.5 (e), 124.9 (b), 952.19 and 953 of Title 39 of the Code of Federal Regulations are set forth below, as indicated.
(Please note that Section 953 has been recently recodified. It was formerly numbered as Section 203, and is so referred to in the administrative proceedings and in the proceedings before the District Court.)

Title 39—Chapter I

PART 124—NONMAILABLE MATTER

Sec.

124.1 Introduction.
124.2 Harmful matter.
124.3 Intoxicating liquors.
124.4 Obscene and indecent matter.
124.5 Lotteries, frauds, and libelous matter.
124.6 Disloyalty and threats to the President.
124.7 Copyright violations.
124.8 Certain foreign communications.
124.9 Opinions on mailability.

AUTHORITY: The provisions of this Part 124 issued under R.S. 161, as amended, sec. 1, 62 Stat. 740, 741, 761–763, 768, 769, 781, 782, 64 Stat. 451; 5 U.S.C. 22, 17 U.S.C. 101, 18 U.S.C. 871, 876, 877, 1262, 1302, 1305, 1341, 1342, 1461, 1463, 1714–1718, 39 U.S.C. 501, 4000–4007, 4057, 4353.

SOURCE: The provisions of this Part 124 appear at 26 F.R. 11524, Dec. 6, 1961, unless otherwise noted. Redesignated at 31 F.R. 15350, Dec. 8, 1966.

§ 124.4 Obscene and indecent matter.

(a) *Lewd or filthy matter.* Obscene, lewd, lascivious, or filthy publications or writings, or mail containing information concerning where, how, or from whom such may be obtained, and matter which is otherwise mailable but which has on its wrapper or envelope any indecent, lewd, lascivious, or obscene writing or printing. Any mail containing any filthy, vile, or indecent thing.

§ 124.5 Lotteries, frauds, and libelous matter.

(e) *Libelous matter.* Any matter otherwise mailable which has on its outside wrapper or envelope, or any postal card or post card carrying on it:

(1) Any libelous, scurrilous, defamatory, or threatening language, whether written or printed, or which by its manner or style of display is obviously intended to reflect injuriously on the character or conduct of another; or

(2) Any language asking for payment of a bill, which by its manner or style of display is defamatory and reflects injuriously on the character of addressee.

§ 124.9 Opinions on mailability.

(b) Postmasters and other employees at post offices shall not give opinions to the public concerning the mailability of matter under §§ 124.4, 124.5, 124.6,

124.7, 124.8 and §§ 125.5, 125.6 of this chapter. When in doubt as to the mailability of any such matter, the postmaster shall withhold it from dispatch or delivery, and shall send a sample or a complete statement of the facts to the Mailability Division, Office of the General Counsel, for instructions. Newspaper containing doubtful matter should be promptly reported to the Mailability Division, Office of the General Counsel, but they should not be withheld from dispatch without specific instructions.

§ 952.19 Subpoenas.

The Post Office Department is not authorized by law to issue subpoenas requiring the attendance or testimony of witnesses.

PART 953—RULES OF PRACTICE IN PROCEEDINGS RELATIVE TO MAILABILITY

Sec.

953.1 Authority for rules.
953.2 Limitation.
953.3 Initiation.
953.4 Complaint.
953.5 Notice of hearing; service.
953.6 Compromise and informal dispositions.
953.7 Answer.
953.8 Default.
953.9 Hearing.
953.10 Change of place of hearing.
953.11 Presiding officers.
953.12 Proposed findings of fact.

953.13 Initial decision.
953.14 Appeal.
953.15 Departmental decision.
953.16 Expedition.
953.17 Disposition.

AUTHORITY: The provisions of this Part 953 issued under 5 U.S.C. 301, 39 U.S.C. 501.

SOURCE: The provisions of this Part 953 appear at 26 F.R. 12777, Dec. 30, 1961, unless otherwise noted. Redesignated at 31 F.R. 16270, Dec. 20, 1966.

§ 953.1 Authority for rules.

These rules of practice are issued by the Judicial Officer of the Post Office Department pursuant to authority delegated by the Postmaster General.

§ 953.2 Limitation.

The rules shall be applicable only to cases where the matter offered for mailing shall be of substantial value or quantity. The initial determination of this question by the General Counsel may be appealed to the Judicial Officer.

§ 953.3 Initiation.

Upon receipt of mail matter of doubtful mailability under the provisions of 18 U.S.C. 1302, 1461, 1463, 1717 or 1718 (see also 39 U.S.C. 4001) submitted by a postmaster pursuant to § 124.9(b) of this chapter (§ 124.92 of the Postal Manual), the General Counsel shall: (a) File a complaint with the Docket Clerk of the Post Office Department or (b) instruct the postmaster to accept such matter for mailing.

§ 953.4 Complaint.

The complaint shall: (a) State statutory and/or regulatory authority for withholding the matter from the mails; (b) specify the character or content of the matter which the Complainant believes to be nonmailable; and (c) request the issuance of a notice of hearing by the Docket Clerk.

§ 953.5 Notice of hearing; service.

Upon receipt of the complaint the Docket Clerk shall issue a notice setting the time and place for the hearing. The date set for the hearing shall be within ten days of the date of the filing of the complaint. The notice, together with copies of the complaint and these rules, shall be sent promptly to the postmaster at the place of mailing to be served upon the mailer or his agent. A receipt therefor shall be obtained and forwarded immediately to the Docket Clerk. If personal service cannot be made, the notice of hearing shall be deposited in the mails for delivery in the regular course which shall constitute valid service. A report of such delivery shall be promptly forwarded to the Docket Clerk.

§ 953.6 Compromise and informal dispositions.

The mailer may request a conference with the Complainant to consider informal disposition of any question of mailability or apply to the Complainant for the withdrawal of the matter from the

mails. When such a request is received, the scheduled hearing date will be postponed for such period of time as may be necessary but in no event longer than five days unless specifically requested by the mailer. If no agreement is reached, the proceeding shall promptly be rescheduled for hearing.

§ 953.7 Answer.

The mailer may file an answer to the complaint and appear in person or by counsel at the hearing. The answer shall contain a reply to each allegation in the complaint and shall be filed in triplicate with the Docket Clerk in Room 3350, Post Office Department, Washington, D.C. 20260, at least three days prior to the date set for the hearing. Each allegation not answered shall be deemed admitted.

§ 953.8 Default.

If no answer to the complaint is filed, the mailer shall be deemed in default and the Judicial Officer shall instruct the postmaster of the disposition to be made of the matter in accordance with § 953.17. If the mailer files an answer but fails to appear at the hearing, the Hearing Examiner shall receive the evidence of the Complainant and render an initial decision pursuant to § 953.13.

§ 953.9 Hearing.

Unless otherwise ordered by the presiding officer, the hearing shall be held in Room 5241, Post Office Department, 12th and Pennsylvania Avenue NW.,

Washington, D.C. 20260, on the date set in the notice.

§ 953.10 Change of place of hearing.

Not later than the date fixed for the filing of the answer, a party may file a request that a hearing be held to receive evidence in his behalf at a place other than that designated for hearing in the notice. He shall support his request with a statement outlining: (a) The evidence to be offered in such place; (b) the names and addresses of the witnesses who will testify; (c) the reasons why such evidence cannot be produced at Washington, D.C. The presiding officer shall give consideration to the convenience and necessity of the parties and the relevancy of the evidence to be offered.

§ 953.11 Presiding officers.

The presiding officer at any hearing shall be a Hearing Examiner qualified pursuant to the Administrative Procedure Act (5 U.S.C. 1010) or the Judicial Officer (74 Stat. 554, Public Law 86–676). The Chief Hearing Examiner shall assign cases to Hearing Examiners upon rotation so far as practicable. The Judicial Officer may, for good cause shown, preside at the reception of evidence in proceedings where expedited hearings are requested by either party.

§ 953.12 Proposed findings of fact.

Unless otherwise ordered, proposed findings of fact and conclusions of law shall be submitted orally or in writing at the conclusion of the hearing.

§ 953.13 Initial decision.

Unless given orally at the conclusion of the hearing, the Hearing Examiner shall render an initial decision as expeditiously as practicable following the conclusion of the hearing, and the receipt of the proposed findings, if any. The initial decision shall become the departmental decision if an appeal is not perfected.

§ 953.14 Appeal.

Either party may file exceptions in a brief on appeal to the Judicial Officer within five days after receipt of the initial decision unless additional time is granted. A reply brief may be filed within five days after the receipt of the appeal brief by the opposing party.

§ 953.15 Departmental decision.

The Judicial Officer shall render a Departmental decision or refer the matter to the Postmaster General for decision. The decision shall be served upon the parties and the postmaster.

§ 953.16 Expedition.

For the purposes of further expedition the parties may, with the concurrence of the Judicial Officer, agree to waive any of these procedures. When the Judicial Officer presides at the hearing, he shall render a tentative or final decision after the conclusion of the hearing. Exceptions may be filed to a tentative decision in accordance with § 953.14.

§ 953.17 Disposition.

Matter found to be nonmailable shall be held at the post office where detained for a period of fifteen days from the date of the Departmental decision, unless extended by the Judicial Officer. During that time the mailer may make application for the withdrawal of the matter. The Judicial Officer shall order the matter returned to the mailer or otherwise disposed of in accordance with 39 U.S.C. 4001(b).